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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

NO. 75-1383

McCORVEY SHEET METAL WORKS, INC.,
Petitioner,

versus

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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BLEED THROUGH

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To The Honorable, The Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

McCorvey Sheet metal Works, Inc. prays that a *writ of certiorari* issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in the above entitled case on December 11, 1975.

OPINION BELOW

There is no written opinion of the Court of Appeals (Gewin, Goldberg and Dyer, Circuit Judges). The decision is unpublished. Copies of the Judgment and decision

are reproduced in the Appendix. The decision of the administrative law judge and the decision and order of the National Labor Relations Board are reproduced in the Appendix. The Board's decision and order is reported at 216 N.L.R.B. No. 146.

JURISDICTION

The judgment of the Court of Appeals was entered on December 11, 1975. Petition for Rehearing was denied February 9, 1976, and this Petition for Writ of Certiorari is filed within 90 days of that date.

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the Court of Appeals has abdicated its responsibility to require substantial evidence in the record to support the National Labor Relations Board's findings?

STATUTE INVOLVED

29 U.S.C. 160(e) provides in part,

> "The Board shall have power to petition any court of appeals of the United States, or if all the courts of appeals to which application may be made are in vacation, any district court of the United States, within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceedings, as provided in section 2112 of Title 28. Upon the filing of such petition, the court shall cause notice

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thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive . . ."

STATEMENT OF THE CASE

The National Labor Relations Board filed an application for enforcement of its order against McCorvey Sheet Metal Works, Inc. (herein "McCorvey") requiring Respondent to offer a discharged employee reinstatement and to make his whole for the loss of pay suffered because of Respondent's discrimination.

Arthuro Torres, a union steward, was discharged from the employ of McCorvey Sheet Metal Works, Inc. on May 28, 1974. McCorvey had contracted to perform all sheet metal work on the construction of the Child Health Center in Galveston, Texas. Work started in February 1974. Four union members including Torres and the foreman, Charles Sawey, worked on the job for McCorvey. Sawey testified that in February Torres would do his work, but within a month thereafter, Torres would do less and less work. He requested that McCorvey replace Torres on numerous occasions, the first occasion being as early as March 1974.

On each occasion, Raymond McCorvey declined and asked Sawey to be particularly tolerant with Torres as Raymond McCorvey understood from the union business agent that Torres was on the union executive committee. The business agent volunterred that Torres would start on a job as a hard worker, then his work would get weaker, but that he, the business agent, would stay behind Torres.

Finally on May 23, 1974, Sawey took the afternoon off to attend a funeral. Before leaving, he instructed Torres and the employee under Torres to hang some ducts. Viewing the work done or lack of it, the next morning Sawey demanded to know why no work had been done. Torres replied that some hangers had broken. Upon finding the hangers were not broken, Sawey again demanded that Raymond McCorvey dismiss Torres or that he, Sawey, would quit. Finally, realizing that the job would not be done with Torres as a member of his small work force, Raymond Torres authorized Torres' discharge.

On April 30, May 9, and May 15, Torres, as steward, had complained to Sawey that he was allowing sheet metal work to be given to another trade on a job across the street. This matter was resolved on May 17. The Board found that McCorvey discharged Torres because he insisted that something be done about the sheet metal work performed by another craft on the job across the street.

The order of the Board was ordered enforced by a *per curiam* decision of the Court of Appeals dated November 11, 1975.

McCorvey petitioned for a rehearing. The petition was denied February 9, 1976.

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REASONS FOR GRANTING THE WRIT

The decision of the Court of Appeals does not apply the standards set by this Court in *Universal Camera Corp. v. National Labor Relations Board,* 340 U.S. 474 (1951).

This case does not involve new areas of law or great individual injustice. It involves some amount of money for back pay for one discharged employee. What Petitioner seeks is a reiteration by this Court of the principles applicable to the Fifth Circuit Court of Appeals' review of decisions of the Board to the end that the findings of administrative hearing examiners are not in fact decisions of a court of last resort.

There is no reasonable basis for the Board's finding in the record and the Court of Appeals has apparently abdicated its function in reviewing the record for substantial evidence to support the Board's findings. In *Universal Camera,* Justice Frankfurter in delivering the opinion of the Court, stated that Congress has imposed upon the Court of Appeals the responsibility for the reasonableness and fairness of labor board decisions and assuring that the Board keeps within reasonable bounds. The opinion cautions that just because the Court of Appeals responsibility is limited to enforcing the requirement that substantial evidence appear on the record as a whole, is no basis for abdication of its judicial function. The Court vacated and remanded the cause.

In *National Labor Relations Board v. Walton Manufacturing Co.,* 369 U.S. 404 (1962), the Court in a *per curiam* decision, Justice Frankfurter joined by Justice Harlan dissenting, reiterates the *Universal Camera* statement to the effect that the Supreme Court will intervene

only when the standard for review has been misapprehended or grossly misapplied and remanded. The opinion bases reversal on the Fifth Circuit's recitation of a special standard of review of the record in reinstatement cases. It should be noted that Justice Frankfurter pointed out that this Court has never before required complete deference to credibility findings and points out that administrative determinations of credibility are often set aside on credibility as shown on the record. The teaching to the Court of Appeals is to always recite the correct standard.

Under the Fifth Circuit's present practice of no opinions, it can not err in applying the wrong standard in affirming Board decisions. The effect is the hearing examiner's findings can not be attacked.

Raymond McCorvey is like so many small businessmen dealing with the avalanche of laws and regulations coming out of Washington. When confronted with the form of notice from an agency notifying him to appear on a given date concerning a matter, he did so. He appeared without counsel apparently thinking he would be able to tell his side of the dispute, and being confident that the truth would out. The only direct testimony concerning motive for firing Torres was his and the foreman and fellow union member, Charles Sawey. The attorney for the Board on direct, adduced from Torres double hearsay in response to leading questions, which answers were given after reference to notes, all without objection. Thereafter, when Raymond McCorvey attempted to put on evidence, he was met with repeated objections and interruptions.[1]

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1. Raymond McCorvey attempting to question the foreman, Charles Sawey, as a witness for McCorvey:

Q. (By Raymond McCorvey) How many times did you ask me to discharge—well, not exactly how many times, but was it

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The direct testimony shows that there was no animosity on the part of either Raymond McCorvey or Sawey as a result of Torres union activity.[2] The fact that Sawey com-

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more than once that you asked me to discharge Arthur Torres for his inefficiencies?

A. Yes, sir.

Q. Did I give you a reason for not discharging him?

A. Yes, sir. You told me that he was a member of the "E" board, and we didn't want to have any hard feelings with the Local 144, so we worked—tried to keep him there, then he was just —it was just getting worse and worse.

Q. Did you call me one day and more or less issue an ultimatum that—

MR. ARTER: Objection, your Honor. He's just testifying for the witness.

JUDGE JANUS: Yeah. You see, you're suggesting an answer. Ask him—it seems to me what you want to go into is the relationship between Mr. Sawey and Mr. Torres on the job.

MR. McCORVEY: Well, aren't we after the facts in the case?

JUDGE JANUS: Well, yes. The facts are—let's do it in a logical manner. Find out what it is that Mr. Sawey objected to in Mr. Torres, and then we can go into what he told you.

Q. (By Mr. McCorvey) O.K. Did I call you—when you made a report to me, did you ask for more help at times—let me see how you put this.

MR ARTER: Your Honor, perhaps if you'd say, "Just ask him the question what he said to him," maybe he would do it.

MR. McCORVEY: Do what now?

JUDGE JANUS: Well, apparently there were more than one conversations between Mr. Sawey and Mr. McCorvey. We ought to try to get what happened in a chronological manner. Mr. Torres worked from February to May, the end of May, as I understand it. Now, did you ever talk to Mr. Torres about his falling down on the job?

THE WITNESS: Well, now, I can't remember any dates, but I assigned him chores every morning, and times they didn't get done. Sometimes they got weak, and then they was just getting weaker and weaker, but like the man said, he was a member of the "E" board and he wanted us to just—

JUDGE JANUS: Well, he says he wasn't a member of the "E" board. How did you get the idea that he was a member of the "E" board? (Tr. 94-96)

2. Raymond McCorvey in response to a statement by the hearing examiner:

plained that Torres work was unsatisfactory before any union steward activities by Torres is clear.[3] The facts in the record so clearly do not meet the requirement that the findings be supported by substantial evidence that coupled with the Court of Appeals summary disposition[4]

MR. McCORVEY: And what I need to know is this fellow is an attorney representing Torres, and the "crossing the t's and dotting the i's". All I know is the facts in the case, I never discharged the man for any union activities. That's the facts in the case, and any way we can put all these things together and come up with anything different than that, as far as I'm concerned, it's not true. (Tr. 70)

3. Raymond McCorvey as a witness being cross examined by counsel for the Board concerning how long before May 28, when Torres was discharged, had reports of his work being unsatisfactory been received:

Q. Was that the first time you can recall that you received a report that he was lax?

A. Oh, no, no, sir. Numerous times.

Q. Can you give us the first time that you received a report that he was lax?

A. Well, now, I would say for all practical purposes, six weeks to two months before that. I don't have any specific date. These were just job reports.

Q. O.K. Who made that report?

A. Charles Sawey made the report on the Child Health Center. (Tr. 130)

4. Rule 21 of the Local Rules of the United States Court of Appeals for the Fifth Circuit provides:

"When the court determines that any one or more of the following circumstances exists and is dispositive of a matter submitted to the court for decision: (1) that a judgment of the district court is based on findings of fact which are not clearly erroneous; (2) that the evidence in support of a jury verdict is not sufficient; (3) that the order of an administrative agency is supported by substantial evidence on the record as a whole; (4) that no error of law appears; and the court also determines that an opinion would have no precedential value, the judgment or order may be affirmed or enforced without opinion.

In such case, the court may in its discretion enter either of the following orders: 'AFFIRMED. See Local Rule 21,' or 'ENFORCED. See Local Rule 21.'

See N.L.R.B. v. Amalgamated Clothing Workers of America, 5th Cir. 1970, 430 F.2d 966."

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of the cause leaves the conclusion that the Court failed to meet its responsibility under *Universal Camera.*

CONCLUSION

While the policy of preservation of the judicial system which underlies Rule 21[5] of the Local Rules of the Fifth Circuit is even more persuasive six years after the announcement of the Rule, Petitioner submits that the crush of the appellate case load of that Honorable Court must be balanced against what is in effect the sanction of practices in the trial before the administrative law judge which have no place in our system of jurisprudence. If Raymond McCorvey, a layman without counsel, can be convicted by an administrative agency with no more warning or procedural safeguards than are exhibited by the record in this case, if every individual must pay a lawyer to represent him in every commercial or social encounter, or be assessed financial penalty, ultimately what has been a workable system will be destroyed. The system can work, but only by vigilant maintenance of common standrads of fairness by the administrative agencies. For this reason an examination of the manner in which the Courts of Appeal now review decisions of the Board should be undertaken.

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5. *Ibid.*

Petitioner, therefore, respectfully prays that its petition for *writ of certiorari* be granted.

March 27, 1976

Respectfully submitted,

VAN E. MCFARLAND
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Houston, Texas 77002
(713) 225-9471

CERTIFICATE OF SERVICE

I hereby certify that three true and correct copies of the foregoing Petition for Writ of Certiorari have been served upon each of the parties listed below, by air mail, postage prepaid, on this the 27th day of March, 1976, addressed as follows:

Solicitor General
Department of Justice
Washington, D. C. 20530

Messrs. William Wachter and
John Depenbrock, Attorneys
National Labor Relations Board
Washington, D. C. 20570

VAN E. MCFARLAND

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 75-2163

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

McCORVEY SHEET METAL WORKS, INC.,
Respondent.

JUDGMENT

Before: GEWIN, GOLDBERG and DYER, Circuit Judges.

THIS CAUSE was submitted upon an application of the National Labor Relations Board for enforcement of a certain order issued by it against Respondent, McCorvey Sheet Metal Works, Inc., Houston, Texas, its officers, agents, successors, and assigns on February 28, 1975. The Court, having carefully considered the briefs and transcript of record filed in this cause, and being fully advised in the premises, and having determined the case appropriate for summary disposition without oral argument, on November 11, 1975, handed down its decision granting enforcement of the Board's Order. In conformity therewith it is hereby

ORDERED AND ADJUDGED by the United States Court of Appeals for the Fifth Circuit that the said order of the National Labor Relations Board in said proceeding be enforced, and that the Respondent, McCorvey Sheet Metal Works, Inc., Houston, Texas, its officers, agents, successors, and assigns, abide by and perform the directions of the Board in said order contained.

ENTERED: December 11, 1975

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APPENDIX B

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 75-2163
Summary Calendar*

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

versus

McCORVEY SHEET METAL WORKS, INC.,
Respondent.

Application for Enforcement of an Order of the National Labor Relations Board

(Texas Case)

(November 11, 1975)

Before GEWIN, GOLDBERG and DYER, Circuit Judges.

PER CURIAM: ENFORCED. See Local Rule 21.[1]

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* Rule 18, 5 Cir.; see Isbell Enterprises, Inc. v. Citizens Casualty Company of New York, et al., 5 Cir. 1970, 431 F.2d 409, Part I.

1. See NLRB v. Amalgamated Clothing Workers of America, 5 Cir. 1970, 430 F.2d 966.

APPENDIX C

[dated February 28, 1975]

* * *

DECISION

Statement of the Case

MILTON JANUS, Administrative Law Judge: The General Counsel issued his complaint in this proceeding on August 13, 1974, after a charge filed on July 8, 1974.[1] The complaint alleged that Respondent had discharged Arthuro Torres on or about May 24, because of his activities on behalf of Sheet Metal Workers' International Association, Local No. 144 (Local 144) and/or because he engaged in other concerted activities for the purpose of collective bargaining or other mutual aid or protection. Sections 8(a)(3) and (1) of the Act are thereby said to have been violated.

I held a hearing in this matter on October 3, 1974, at Houston, Texas, at which all parties were represented, the Respondent by its president, Raymond McCorvey. After the hearing, Respondent retained counsel who filed a brief on its behalf. A brief was also received from the General Counsel. Upon the entire record in the case, including my observation of the witnesses and their demeanor, I make the following:

Findings of Fact

I. The Business of the Respondent

Respondent is a Texas corporation which is engaged in the business of fabricating and installing sheet metal and

1. All events here took place in 1974.

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related products. Its principal office and place of business is in Houston, Texas. During the past year it purchased goods valued in excess of $50,000 from firms located outside the State of Texas, and such goods were shipped directly in interstate commerce to its plant from states other than Texas. I find that Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. The Labor Organization Involved

Sheet Metal Workers' International Association and its Local No. 144 are labor organizations within the meaning of Section 2(5) of the Act.

III. The Unfair Labor Practices

McCorvey is a sheet metal contractor headquartered in Houston, who had subcontracts with separate contractors on two construction jobs in Galveston. The first of these was the Child Health Center, a new facility, for which it had contracted to perform all the sheet metal work. This job was scheduled to last 1½ to 2 years. Across the street from the Center jobsite was the existing Borden Building which was being renovated. Here, Respondent had a subcontract with a plumbing contractor, Har-Con, to do certain demolition and installation work.

The record does not disclose whether Respondent was a signatory to contracts with Sheet Metal Workers Union Local 54, in the Houston area, or with Local 144 in the Galveston area, but it is clear that it operated as a union shop, observing union wage scales and hiring through the Union hall. For his Galveston jobs, McCorvey also complied with a rule of Local 144, permitting him to bring in no more than two workers from Houston and hiring all other sheet metal journeymen through Local 144.

Torres, the charging party in this case, was a member of Local 144, who had been hired to work on the Child Health Center job in February. Charles Sawey, a member of Local 54, was the foreman for the job, and Paul Simpkulet was the second journeyman from the Houston Local, permitted to work there. Torres was appointed the steward on the Center job by Marshall, business agent of Local 144, and Sawey was informed of the appointment. In April and May the sheet metal crew included a fourth man, Meadows, who was also a member of Local 144. There was no fulltime sheet metal worker employed on the Borden job until May 17.

The General Counsel contends that Torres was discharged on May 28, because foreman Sawey resented his protests, both to Sawey and to Local 144's business agent, that he had permitted work on the Borden job, within the Union's jurisdiction, to be performed by another craft. Respondent contends, to the contrary, that Sawey had Torres discharged because of his poor job performance and personality conflicts between them.

During April and May, while the four man sheet metal crew was working full time at the Child Health Center job, there was little sheet metal work to be done on the Borden job. Har-Con, the plumbing contractor, was engaged in tearing down the old air-conditioning system preparatory to installing a new one. Under the work jurisdictional rules of the Plumbers Union and the Sheet Metal Workers Union, it was obligatory that a sheet metal worker disconnect the ducts adjacent to air-handling units, which are large pieces of equipment containing evapora-

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tors and filter coils. After the ducts were disconnected and moved, the removal of the air-handling units was to be performed by a composite crew of plumbers and sheet metal workers.[2] Before a full time sheet metal worker was hired in mid-May for the Borden job, Raymond McCorvey had an arrangement with Marshall of Local 144 that whatever sheet metal work had to be done there could be done by a member of the Child Health Center crew.

On three occasions, April 30, May 9 and May 15, Har-Con's plumbing foreman at the Borden job came over and asked Sawey to send one of the men over to do some work within the Sheet Metal Workers jurisdiction, and each time Sawey said his men were too busy to do the work then. Paul Simpkulet, one of the crew at the Center job, had been designated by McCorvey to do whatever sheet metal work had to be done at the Borden job, and it appears from the record that he had gone over there on some occasions. It is undisputed, however, that he had gone over there on some occasions. It is undisputed, however, that on April 30, May 9 and 15, Sawey refused to send him or anyone else over to Borden because they were then too busy on their own work. Torres was present on these three dates, when Sawey told the Har-Con foreman to do the best he could because he had no sheet metal workman available. Torres asked Sawey on April 30, whether it was sheet metal work that had to be done at Borden, and Sawey admitted that it was.

On May 9, when Sawey again refused to send anyone from his crew over to the Borden job, Torres called his

2. If I understand Raymond McCorvey's testimony correctly, it is that his contact with Har-Con did not include removal of the air-handling units, although he also seemed to acknowledge that composite crews were required for that work.

business agent, Marshall, to tell him that other trades were doing sheet metal work there. Marshall came to the Center job that afternoon and attempted to reconcile the differences between Torres and Sawey. If Marshall also told Sawey that he had to conform to his union's jurisdictional claims, it does not appear in the record. Torres told Marshall that Sawey's attitude towards him had changed, and that he thought Sawey was trying to provoke an argument. Marshall then prevailed on them to shake hands, but it is clear that Marshall had not satisfied Torres' concern that sheet metal work at Borden was being done by other trades.

The Following week, on May 15, the Har-Con foreman again asked Sawey to send someone over to disconnect some ducts, but Sawey again refused, saying that the man designated to go over there was busy. Torres offered to go, but Sawey said that he was not responsible for the Borden job and wouldn't have anything to do with it. Torres then called Marshall who told him to go back to work while he got the matter straightened out. That evening, Torres went to the Union hall where he saw Marshall, who told him that he had talked to Raymond McCorvey, and they had agreed that someone would be hired to work only on the Borden job.

According to Torres, he saw Marshall again at the Union hall on Saturday, May 18. Marshall told him that Sawey had asked that he be replaced by another worker. Marshall did not testify, so Torres' report that Marshall said he told Sawey that Torres was a good worker and he could not understand why Sawey wanted to get rid of him, is hearsay. Sawey, however, did testify, and did not deny having told Marshall sometime after May 15, that he wanted to replace Torres. I am not willing to rely

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on Torres' hearsay testimony that Marshall said he was a good worker, but I am satisfied that Sawey had informed Marshall, before the next incident which occurred May 23-24, that he wanted to replace Torres.

Sawey and Simpkulet attended a funeral the afternoon of May 23, leaving Torres and Meadows to continue their assigned work of hanging ducts. According to Sawey, when he returned the next morning, he found that very little work had been done. He taxed Torres with falling down on the job, there was an argument and Sawey then called McCorvey and got his permission to discharge Torres. He was paid off early the following week, after some dispute about whether he had been given adequate notice under the Union's rules.

Torres testified, as to his work performance the afternoon of May 23, that he and Meadows had been hanging ducts and "had stayed busy." When Sawey accused him of "taking a nap," he insisted that any complaints about the work should also be directed at Meadows, since the two of them had worked together. Torres said that Sawey told him to leave Meadows out of it, that it was just between the two of them, and that Torres was hired to work and keep his mouth shut. Torres said that he then told Sawey that as the job steward he had to protect his work, that Sawey had a chip on his shoulder about it, and that it was all uncalled for.

Both Sawey and McCorvey denied that Torres had been discharged because of his complaints and inquiries of Sawey and Marshall concerning sheet metal work at Borden being given away to another trade. They testified that Sawey had complained to McCorvey a number of times in the past few months about Torres' work, while

McCorvey said he had mentioned it to Marshall, who asked him to bear with Torres because he was a member of the Local's Executive Board. Torres denied that he had ever been a member of the Board.

The critical question is whether Sawey asked McCorvey to discharge Torres because of his performance on the job, or because he resented Torres' persistent questioning of Sawey's failure to send a sheet metal worker over to the Borden job when Har-Con requested one. Both Sawey and McCorvey were vague and unspecific as to what it was about Torres' work that they found so unsatisfactory. It is true that a supervisor may form an impression of an employee's job performance without being able to document it, particularly in a trade where the work is varied and nonrepetitive. Nevertheless, Sawey's objections to Torres' performance on the job seem especially unsubstantiated here, being directed mainly at Torres' attitude and his own belief that his authority as foreman was being questioned.

It is not that I don't believe Sawey — undoubtedly there came a time when Sawey and Torres could no longer work together harmoniously — but the issue is rather if Sawey was substantially motivated by Torres' activity, which is protected by the Act, in calling Marshall's attention to infringement of the Union's jurisdictional rights. I find that Sawey and McCorvey were in fact so motivated. I note that Respondent was forced to hire a sheet metal worker for the Borden job after Torres' complaint of May 15, when it seems that there was still not enough work to occupy a man full time, and that Sawey singled Torres out on May 24, for allegedly failing to work energetically the afternoon before, even though Meadows would have been equally at fault. The matter is certainly

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not free from doubt, since it is notoriously difficult to determine motivation from ambiguous facts. I am convinced, however, on consideration of all the elements here, that Sawey and McCorvey mutually decided that Torres had to go because of his insistence that something be done about the sheet metal work at the Borden job. I therefore find that the discharge of Torres was in violation of Section 8(a)(3) and (1) of the Act.[3]

Conclusions of Law

1. The Respondent is engaged in commerce and in activities affecting commerce within the meaning of Section 2(6) and (7) of the Act.

2. Sheet Metal Workers' International Association and its Local No. 144 are labor organizations within the meaning of Section 2(5) of the Act.

3. By discriminatorily discharging Arthuro Torres on May 28, 1974, thereby discouraging him and other employees from joining or assisting the Union, or from engaging in other union or concerted activity for the purpose of collective bargaining or other mutual aid or protection, the Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(3) and (1) of the Act.

4. The aforesaid unfair labor practices are unfair labor practices within the meaning of Section 2(6) and (7) of the Act.

The Remedy

Having found that Respondent has committed certain unfair labor practices, I shall recommend that it cease

3. *Illinois Institute of Technology*, 201 NLRB 941.

and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

Having discriminatorily discharged Arthuro Torres, I find it necessary to order the Respondent to offer him reinstatement, with backpay computed on a quarterly basis from the date of his termination to the date of the offer of reinstatement, as prescribed in *F. W. Woolworth Company,* 90 NLRB 289, plus interest at 6 percent per annum. I shall also order it to post appropriate notices.

Upon the foregoing findings of fact, conclusions of law, and the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:[4]

ORDER

Respondent, McCorvey Sheet Metal Works, Inc., its officers, agents, successors and assigns, shall:

1. Cease and desist from:

(a) Discouraging membership in Sheet Metal Workers' International Association and its Local No. 144 or in any other labor organization of its employees, by discriminatorily discharging, or in any other manner discriminating against any employee in regard to hire, tenure or any other term or condition of employment.

(b) In any manner interfering with, restraining or coercing its employees in the exercise of their right to self-organization, to join or assist the above-named labor

4. In the event no exceptions are filed as provided by Section 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Section 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order and all objections thereto shall be deemed waived for all purposes.

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organization or any other labor organization, to bargain collectively through representatives of their own choosing, to engage in other concerted activities for the purpose of mutual aid or protection as guaranteed in Section 7 of the National Labor Relations Act, or to refrain from any or all such activities.

2. Take the following affirmative action necessary to effectuate the policies of the Act:

(a) Offer Arthuro Torres immediate and full reinstatement to his former job, without prejudice to his seniority or other rights and privileges, and make him whole for any loss of earnings he may have suffered by reason of the discrimination against him, in the manner set forth in "The Remedy."

(b) Preserve and upon request, make available to the Board or its agents for examination and copying, all records necessary to analyze the amount of backpay due, and the right of reinstatement.

(c) Post at its Child Health Center job in Galveston, and at its office at Houston, Texas, copies of the attached notice marked "Appendix."[5] Copies of the notice, on forms provided by the Regional Director for Region 23, after being duly signed by an authorized representative of the Respondent, shall be posted immediately upon receipt thereof, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable

5. In the event the Board's Order is enforced by a Judgment of the United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall be changed to read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

steps shall be taken by Respondent to ensure that said notices are not altered, defaced or covered by any other material.

(d) Notify the Regional Director for Region 23, in writing, within 20 days from the receipt of this Decision, what steps the Respondent has taken to comply herewith.

Dated at Washington, D.C.

/s/ Milton Janus
Milton Janus
Administrative Law Judge

BLEED THROUGH

APPENDIX D

[dated March 6, 1975]

* * *

DECISION AND ORDER

On December 17, 1974, Administrative Law Judge Milton James issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief, and the General Counsel filed a brief in support of the Administrative Law Judge's Decision.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings, and conclusions of the Administrative Law Judge and to adopt his recommended Order,[1] as modified herein.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge, as modified below, and hereby orders that Respondent, McCorvey Sheet Metal Works, Inc., Houston, Texas, its officers, agents, successors and

1. In this section of his Decision entitled "Order" the Administrative Law Judge inadvertently omitted certain *pro forma* language from the paragraph providing for reinstatement. This inadvertence is hereby corrected.

assigns, shall take the action set forth in the said recommended Order, as so modified:

1. Substitute the following for paragraph 2(a) of the recommended Order:

"(a) Offer Arthuro Torres immediate and full reinstatement to his former job or, it it no longer exists, to a substantially equivalent position, without prejudice to his seniority or other rights and privileges, and make him whole for any loss of earnings he may have suffered by reason of the discrimination against him, in the manner set forth in "The Remedy."

2. Substitute the attached notice for that of the Administrative Law Judge.

Dated, Washington, D.C.

Howard Jenkins, Jr. Member

Ralph E. Kennedy, Member

John A. Penello, Member

National Labor Relations Board

(SEAL)

BLEED THROUGH

In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1383

McCORVEY SHEET METAL WORKS, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The order of the court of appeals (Pet. App. B1) is not reported. The decision and order of the National Labor Relations Board (Pet. App. D1-D2) is reported at 216 NLRB No. 146.

JURISDICTION

The judgment of the court of appeals was entered on December 11, 1975 (Pet. App. A1-A2). A timely petition for rehearing was denied on February 9, 1976 (see Pet. 2). The petition for a writ of certiorari was filed on March 29, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the court of appeals correctly found that substantial evidence on the whole record supports the

Board's factual finding that the company discharged an employee union steward because of his union activity, and not because of poor work performance.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, 61 Stat. 136, as amended, 29 U.S.C. 151, *et seq.*, are:

> Sec. 8. (a) [29 U.S.C. 158(a)] It shall be an unfair labor practice for an employer—
>
> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;
>
> * * * * *
>
> (3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization * * * .

STATEMENT

McCorvey Sheet Metal Works, Inc. ("the Company"), is a sheet metal contractor with main offices in Houston, Texas. In early 1974 it began work on two construction projects in Galveston, Texas (Pet. App. C1-C2; Tr. 40),[1] one involving the construction of the new Child Health Center, and the other (directly across the street from the Child Health Center), involving demolition and installation work at the Borden Building (Pet. App. C2).

Sheet Metal Workers Local 54 represents sheet metal workers in the Houston area, where the Company is

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[1] "Tr." refers to the transcript of testimony before the Board.

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based, while Sheet Metal Workers Local 144 represents such workers in the Galveston area (Pet. App. C2). At the time work commenced at the Child Health Center, the Company, which operates as a union shop, named Charles Sawey, a member of Houston Local 54, as job foreman; Paul Simpkulet, another member of Houston Local 54, also was hired for the job (Pet. App. C3).[2] In addition, the Company hired Arthuro Torres, a member of Galveston Local 144, to work at the Child Health Center. Torres was appointed job steward by Local 144 business agent Bob Marshall (Pet. App. C3). Later, in April, the Company also hired Galveston Local 144 member T.A. Meadows to work at that job (Pet. App. C3; Tr. 7-9, 91).

The Company had no sheet metal worker employed exclusively at the Borden Building. Instead, Company President Raymond McCorvey worked out an arrangement with Union business agent Marshall whereby a member of the Child Health Center crew would be available to do whatever sheet metal work was necessary at the Borden Building (Pet. App. C4; Tr. 11, 121-125).[3] Employee Simpkulet was designated by President McCorvey, and, on occasion, he performed work at the Borden Building job (Pet. App. C4; Tr. 10, 93-94, 128-129).

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[2]The Company's hiring of two men from Houston Local 54 for the job was consistent with Galveston Local 144's rule that the Company be allowed to bring in no more than two workers from Houston for the Galveston jobs (Pet. App. C2).

[3]Under a jurisdictional agreement between the Plumbers and the Sheet Metal Workers Unions, the task of disconnecting and removing the ducts leading to air handling units, which contain evaporators and filter coils, is to be assigned to a sheet metal worker. After the ducts are disconnected and removed, the air handling units are to be removed by a composite crew of plumbers and sheet metal workers (Pet. App. C3-C4; Tr. 47-48, 121, 137-138, 141-142).

However, on several occasions in late April and early May, when the Borden Building plumbing contractor asked Foreman Sawey to send over a man to do some sheet metal work, Sawey refused because he felt the crew was too busy with its own work (Pet. App. C4-C5; Tr. 105-106). After the first such incident, shop steward Torres complained to Sawey that, if one of them was not sent over, the sheet metal work would be done by another craft. When Sawey refused on a second occasion, Torres, who had noticed a change in Sawey's attitude toward him after the first Borden work incident, notified Union business agent Marshall that another craft was doing sheet metal work at the Borden Building (Pet. App. C4-C5; Tr. 13-16). At Torres' request, Marshall came to the Child Health Center and met with Torres and Sawey (Pet. App. C5; Tr. 15-17). At the meeting, Torres told Sawey that he "didn't appreciate him giving our union work away to other crafts" (Tr. 17, 109). Although Sawey and Torres became angry at the meeting, Sawey at that time expressed no dissatisfaction with Torres' work (Tr. 17-21, 106-109).

On May 15, Sawey again refused the plumbing contractor's request that a sheet metal worker be sent over to the Borden Building. Torres offered to do this sheet metal work, but Sawey responded that he was not responsible for the Borden Building and would have nothing to do with it (Pet. App. C5; Tr. 21-22). Torres immediately called Marshall, who spoke with President McCorvey (Pet. App. C5; Tr. 23). Several days later a full time sheet metal worker was employed for the Borden job (Pet. App. C5; Tr. 23-24). About this time, Sawey asked Marshall to replace Torres with another worker (Pet. App. C5-C6; Tr. 24-25).

On May 23, Sawey left work early, telling Torres and Meadows to continue in the job they were doing

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(Pet. App. C6; Tr. 28-29). The next morning, Sawey accused Torres of having done little while he was away and of having taken a nap when he should have been working (Pet. App. C6; Tr. 29-30). When Torres replied that both he and Meadows had stayed busy during the afternoon, Sawey warned him to leave Meadows out of it because "[t]his is between me and you" (Pet. App. C6; Tr. 29-30). Sawey told Torres he was hired to work and to keep his mouth shut; Torres agreed, but explained that, as Union job steward, he had to question Sawey's practice of giving away sheet metal work (Pet. App. C6; Tr. 30). Sawey then called President McCorvey, received permission to fire Torres, and discharged him the next working day, May 28 (Pet. App. C6; Tr. 32-34, 97). No action of any kind was taken against employee Meadows (Pet. App. C7; Tr. 99-100).

The Board concluded upon the evidence in the record that Torres was discharged "because of his insistence that something be done about the sheet metal work at the Borden job," in violation of Section 8(a)(1) and (3) of the Act (Pet. App. C8). In so finding, the Board rejected the Company's assertion that Torres was discharged because of his allegedly inadequate work performance. The Administrative Law Judge, whose decision was adopted by the Board, explained (Pet. App. C7): "Both Sawey and McCorvey were vague and unspecific as to what it was about Torres' work that they found so unsatisfactory." The Law Judge also noted that "Sawey singled Torres out on May 24, for allegedly failing to work energetically the afternoon before, even though Meadows would have been equally at fault" (*ibid.*).

The Board ordered the Company, *inter alia*, to offer Torres reinstatement to his former job or a substantially equivalent position, with backpay (Pet. App. C10).

The court of appeals summarily enforced the Board's order (Pet. App. B1).

ARGUMENT

As petitioner admits (Pet. 2), the only question raised by the petition is whether substantial evidence on the whole record supports the Board's evidentiary finding that Torres was discharged for union activity, rather than for poor work. Such an issue does not warrant review by this Court, where, as here, the court of appeals has sustained the Board's finding. *Universal Camera Corp.* v. *National Labor Relations Board*, 340 U.S. 474, 490-491.

In any event, as shown above, the credited testimony amply supports the Board's finding. Petitioner's argument (Pet. 7-8) in essence is a challenge of the Law Judge's credibility determinations. But in this case the Law Judge necessarily had to resolve questions of credibility, and there is no showing that, in rejecting the Company's assertions, the Law Judge abused his authority to do so. Cf. *National Labor Relations Board* v. *Walton Mfg. Co.*, 369 U.S. 404, 408; *National Labor Relations Board* v. *Pittsburgh* S.S. Co., 337 U.S. 656, 660.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

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NORTON J. COME,
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MAY 1976.

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